

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.** See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2009-0153-PR
Respondent,	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
RICKY LEE SABIN,	)	Rule 111, Rules of
	)	the Supreme Court
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20041696 and CR-20050236 (Consolidated)

Honorable Nanette M. Warner, Judge

REVIEW GRANTED; RELIEF DENIED

Ricky Lee Sabin

Florence  
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 After a bench trial based on stipulated evidence, Ricky Lee Sabin was convicted of sexual conduct with a minor and continuous sexual abuse of a minor and sentenced to consecutive, aggravated terms of imprisonment totaling thirty-seven years. We

affirmed his convictions and sentences on appeal. *State v. Sabin*, No. 2 CA-CR 2005-0181 (memorandum decision filed Nov. 13, 2006). Our supreme court denied review of that decision, and the mandate issued on January 10, 2008.

¶2 In April 2008, Sabin filed a notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. Counsel was appointed and subsequently notified the trial court he had thoroughly studied the record but had found “no tenable issue for review and [could not] proceed,” *see Montgomery v. Sheldon*, 181 Ariz. 256, 260, 889 P.2d 614, 618 (1995), and asked the court to grant Sabin an opportunity to raise claims in a pro se petition for relief and an extension of time to do so. Although Rule 32.4(c)(2) does not expressly require that a non-pleading defendant be given this opportunity, a court does not abuse its discretion in granting such a request. *Cf. State v. Rodriguez*, 183 Ariz. 331, 331-32, 903 P.2d 639, 640-41 (App. 1995) (court abused discretion in denying non-pleading defendant’s request for extension of time to file pro se petition after counsel had found no colorable Rule 32 claims).

¶3 The trial court found the following claims alleged in Sabin’s pro se petition for relief had been resolved on the merits in Sabin’s direct appeal and were therefore precluded pursuant to Rule 32.2(a)(2):

- (1) he was not properly advised of his Fifth Amendment privilege against self-incrimination before waiving his right to a jury trial and therefore the waiver was not knowing, voluntary, and intelligent;
- (2) the inevitable discovery doctrine was improperly applied and therefore his confession should have been suppressed as fruit of the poisonous tree;
- (3) his prior motion to suppress the victim’s statements to her friends was not a tenuous argument and should not have been denied on that

ground; (4) the court erred in denying his *corpus del[i]cti* argument; and (5) he did not knowingly, voluntarily, and intelligently agree to have the trial court conduct his trial on stipulated evidence alone.

The court then considered the merits of Sabin's remaining claims that: (1) the court had erred in aggravating his sentences and (2) his convictions had placed him in double jeopardy in violation of article II, § 10 of the Arizona Constitution. The court concluded these claims were without merit and provided no basis for Rule 32 relief.

¶4 In his pro se petition for review, Sabin maintains the trial court erred in finding this court had already addressed on appeal his claim that the court had failed to advise him of his Fifth Amendment right to remain silent before he waived his right to a jury trial. He also argues the merits of his remaining claims, and he contends he was denied effective assistance of Rule 32 counsel, first because his assigned counsel failed to find any basis for Rule 32 relief and, second, because thereafter, the court denied his repeated requests to have another attorney assigned to prepare a Rule 32 petition.

¶5 We will not disturb a trial court's ruling on a petition for post-conviction relief absent an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). We find none here. Indeed, we conclude the court clearly identified, thoroughly analyzed, and properly resolved all of the issues Sabin presented, and we need not revisit the court's analysis of those issues. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993) (when trial court correctly rules on issues raised "in a fashion that will allow any court in the future to understand the resolution[, n]o useful purpose would be served by this

court[’s] rehashing the trial court’s correct ruling in a written decision”). We add only that relief was denied properly for the additional reason that all of Sabin’s claims are precluded.

¶6 We find no merit to Sabin’s contention that the trial court erred in finding this court had already addressed his claim that he had not been advised he would be waiving his right to remain silent if he proceeded by a bench trial based on stipulated evidence. We are somewhat puzzled by this claim because he was not compelled to testify during the proceeding and he did not testify. Because of the nature of a bench trial based on stipulated evidence, his right to remain silent simply was never implicated and his waiver was not required.

¶7 It appears he may be arguing that he did not understand the nature of the proceeding or that his statements to law enforcement around the time of his arrest would be admitted as evidence against him. Those arguments were raised and addressed on appeal.

Specifically, we concluded:

[T]he record demonstrates that Sabin knowingly, voluntarily, and intelligently agreed to submit the case to the trial court on stipulated evidence in lieu of a jury trial. First, his counsel proposed the idea and itemized the evidence to be considered in Sabin’s presence. Next, still in the presence of Sabin, the court and counsel thoroughly discussed each piece of that evidence. The trial court then placed Sabin under oath and ascertained from Sabin that he was clear-headed and not under the influence of any medications. Thereafter, the court directed Sabin to review and sign a form that specified the rights he was foregoing by waiving his right to a jury trial. Then, the court itself advised Sabin of the rights he would be giving up and the sentencing ranges he faced if the court found him guilty. In response to the court’s questions, Sabin confirmed that his

decision to forego a jury trial was voluntary and intelligent. Although the court did not focus on the distinction between a bench trial with live testimony and a bench trial on stipulated evidence at every step in the colloquy, the trial court made it clear to Sabin that the questions the court was asking Sabin related to his waiver of the right to a jury trial in the context of the latter procedure.

*Sabin*, No. 2 CA-CR 2005-0181, ¶ 36.

¶8 In addition, we conclude Sabin’s failure to raise his claims of sentencing error and double jeopardy on direct appeal resulted in a waiver of these claims, precluding him from raising them in a Rule 32 petition. *See* Ariz. R. Crim. P. 32.2(a)(3) (“A defendant shall be precluded from relief under this rule based upon any ground . . . [t]hat has been waived at trial, on appeal, or in any previous collateral proceeding.”); *see also State v. Shrum*, 220 Ariz. 115, ¶¶ 22-23, 203 P.3d 1175, 1180 (2009) (trial court erred in granting relief on claimed sentencing error that could have been raised in previous Rule 32 proceeding).<sup>1</sup>

¶9 Finally, we find no abuse of discretion in the trial court’s denial of Sabin’s request for the appointment of new counsel after his appointed Rule 32 counsel had found

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<sup>1</sup>Although not required for our decision, we conclude Sabin’s claims are also precluded as untimely. Sabin failed to file a notice of post-conviction relief within thirty days of the mandate affirming the court’s judgment, as required by Rule 32.4(a). Rule 32.4(a) limits the claims that may be brought in an untimely Rule 32 proceeding to those based on Rule 32.1(d) (petitioner being held in custody after sentence expired), (e) (newly discovered material facts that probably would have changed verdict or sentence), (f) (petitioner not at fault for failure to file timely notice of appeal), (g) (significant change in law that, if found to apply, would probably overturn petitioner’s conviction or sentence), or (h) (no reasonable fact finder would have found petitioner guilty beyond reasonable doubt). None of Sabin’s claims are based on these exceptional circumstances.

no basis for a Rule 32 claim. The court correctly concluded that Rule 32.4 “does not allow for the appointment of different counsel” after appointed counsel “has determined that there are no colorable claims that can be raised on the Defendant’s behalf.” *See* Ariz. R. Crim. P. 32.4(c); *see also State v. Mata*, 185 Ariz. 319, 336-37, 916 P.2d 1035, 1052-53 (1996) (non-pleading defendant’s allegation of ineffective assistance of Rule 32 counsel not cognizable constitutional claim under Rule 32).

¶10 For the foregoing reasons, we adopt the trial court’s orders denying Sabin’s requests for new counsel and denying Rule 32 relief but add that all of Sabin’s Rule 32 claims properly were denied because they are precluded. Accordingly, we grant the petition for review, but we deny relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge